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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 CRYSTAL LEE BAKER,)
7 Plaintiff,) No. CV-10-357-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without argument on March 9, 2012 (ECF Nos. 17, 20).
15 Attorney Jeffrey Schwab represents Plaintiff; Special Assistant
16 United States Attorney Michael S. Howard represents the
17 Commissioner of Social Security (Defendant). The parties have
18 consented to proceed before a magistrate judge (ECF No. 7). After
19 reviewing the administrative record and the briefs filed by the
20 parties, the court **GRANTS** Defendant's Motion for Summary Judgment,
21 **ECF No. 20.**

22 **JURISDICTION**

23 Plaintiff protectively applied for disability insurance
24 benefits (DIB) and supplemental security income (SSI) on October
25 22, 2007, alleging disability since January 15, 2007, due to back,
26 leg, and hip problems (Tr. 114-116, 119-122, 125, 142). Both
27 applications were denied initially and on reconsideration (Tr. 74-
28

1 81).

2 Administrative Law Judge (ALJ) Michael S. Hertzog held a
3 hearing on October 14, 2009. Plaintiff, represented by counsel,
4 and a vocational expert testified (Tr. 32-69). The ALJ issued a
5 decision on December 16, 2009, finding Plaintiff can perform past
6 work (Tr. 22-29). Because he found Plaintiff can do past work, she
7 is not disabled as defined by the Act (Tr. 29). On August 17,
8 2010, the Appeals Council denied review (Tr. 1-3). The ALJ's
9 decision became the final decision of the Commissioner, which is
10 appealable to the district court pursuant to 42 U.S.C. § 405(g).
11 Plaintiff filed this action for judicial review on October 14,
12 2010 (ECF Nos. 1, 4).

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing
15 transcripts, the ALJ's decision, and the briefs of the parties.
16 They are briefly summarized here.

17 Ms. Baker was 32 years old at onset and 34 at the hearing
18 (Tr. 38). She completed the eleventh grade. At the time of the
19 hearing, she had been enrolled in college for two and a half
20 years. She was working to obtain her GED, an associate's of arts
21 and sciences degree, and a two-year technical degree in criminal
22 justice. Her grade point average is 3.7. She is married and has
23 four children, ages 5 through 17 (Tr. 38-39, 46, 51-53). She has
24 worked as a waitress and cashier (Tr.

25 Reported activities include attending college three to five
26 days a week and doing college homework. Plaintiff drives, does
27 laundry, cooks (without standing for prolonged periods), helps her
28 children get ready for school, puts them on the school bus and

1 meets them after school, and shops. She vacuums and washes dishes.
2 Three times a week she visits friends at their home or hers (Tr.
3 38, 45, 62-63, 150-154, 191-196).

4 She testified she suffers from back pain and takes prescribed
5 pain medication. Lifting heavy objects causes leg pain and her
6 "hips to go out." She experiences sleep problems. She can walk one
7 to two blocks, sit 20-30 minutes, and stand 15 minutes. Plaintiff
8 testified she cannot lift anything heavier than five pounds.

9 During college classes she is permitted to get up and walk around
10 as needed (Tr. 48, 50, 57, 125). Plaintiff estimated she missed
11 about ten classes a month due to pain or medication side effects
12 (Tr. 59). At least one day a week she needs to stay in bed due to
13 pain (Tr. 61). She lays down for 20 minutes at least five times a
14 day (Tr. 64).

15 SEQUENTIAL EVALUATION PROCESS

16 The Social Security Act (the Act) defines disability as the
17 "inability to engage in any substantial gainful activity by reason
18 of any medically determinable physical or mental impairment which
19 can be expected to result in death or which has lasted or can be
20 expected to last for a continuous period of not less than twelve
21 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
22 provides that a Plaintiff shall be determined to be under a
23 disability only if any impairments are of such severity that a
24 plaintiff is not only unable to do previous work but cannot,
25 considering plaintiff's age, education and work experiences,
26 engage in any other substantial gainful work which exists in the
27 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
28 the definition of disability consists of both medical and

1 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
2 (9th Cir.2001).

3 The Commissioner has established a five-step sequential
4 evaluation process for determining whether a person is disabled.
5 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
6 is engaged in substantial gainful activities. If so, benefits are
7 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
8 the decision maker proceeds to step two, which determines whether
9 plaintiff has a medically severe impairment or combination of
10 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

11 If plaintiff does not have a severe impairment or combination
12 of impairments, the disability claim is denied. If the impairment
13 is severe, the evaluation proceeds to the third step, which
14 compares plaintiff's impairment with a number of listed
15 impairments acknowledged by the Commissioner to be so severe as to
16 preclude substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
18 App. 1. If the impairment meets or equals one of the listed
19 impairments, plaintiff is conclusively presumed to be disabled. If
20 the impairment is not one conclusively presumed to be disabling,
21 the evaluation proceeds to the fourth step, which determines
22 whether the impairment prevents plaintiff from performing work
23 which was performed in the past. If a plaintiff is able to perform
24 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
25 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
26 residual functional capacity (RFC) assessment is considered. If
27 plaintiff cannot perform this work, the fifth and final step in
28 the process determines whether plaintiff is able to perform other

1 work in the national economy in view of plaintiff's residual
 2 functional capacity, age, education and past work experience. 20
 3 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
 4 482 U.S. 137 (1987).

5 The initial burden of proof rests upon plaintiff to establish
 6 a *prima facie* case of entitlement to disability benefits.
 7 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
 8 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
 9 met once plaintiff establishes that a physical or mental
 10 impairment prevents the performance of previous work. The burden
 11 then shifts, at step five, to the Commissioner to show that (1)
 12 plaintiff can perform other substantial gainful activity and (2) a
 13 "significant number of jobs exist in the national economy" which
 14 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 15 Cir.1984).

16 STANDARD OF REVIEW

17 Congress has provided a limited scope of judicial review of a
 18 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 19 the Commissioner's decision, made through an ALJ, when the
 20 determination is not based on legal error and is supported by
 21 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
 22 Cir.1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.1999).
 23 "The [Commissioner's] determination that a plaintiff is not
 24 disabled will be upheld if the findings of fact are supported by
 25 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 26 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
 27 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 28 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*

1 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
2 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
3 Cir.1988). Substantial evidence "means such evidence as a
4 reasonable mind might accept as adequate to support a conclusion."
5 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations
6 omitted). "[S]uch inferences and conclusions as the [Commissioner]
7 may reasonably draw from the evidence" will also be upheld. *Mark*
8 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
9 Court considers the record as a whole, not just the evidence
10 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
11 877 F.2d 20, 22 (9th Cir.1989)(*quoting Kornock v. Harris*, 648 F.2d
12 525, 526 (9th Cir.1980)).

13 It is the role of the trier of fact, not this Court, to
14 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
15 evidence supports more than one rational interpretation, the Court
16 may not substitute its judgment for that of the Commissioner.
17 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
18 (9th Cir.1984). Nevertheless, a decision supported by substantial
19 evidence will still be set aside if the proper legal standards
20 were not applied in weighing the evidence and making the decision.
21 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
22 433 (9th Cir.1987). Thus, if there is substantial evidence to
23 support the administrative findings, or if there is conflicting
24 evidence that will support a finding of either disability or
25 nondisability, the finding of the Commissioner is conclusive.
26 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

27 ALJ'S FINDINGS

28 At step one, the ALJ found Plaintiff earned \$11,528.39

1 working as a waitress¹ in 2008. Nonetheless, he "set aside the SGA
2 issue" and went on to the next step of the sequential evaluation
3 (Tr. 24).

4 After finding in Plaintiff's favor at step one, at step two
5 the ALJ found she suffers from the severe impairments of
6 degenerative disc disease of the lumbar spine and status post
7 right knee arthroscopy (Tr. 25). At step three, he found that
8 although Plaintiff's impairments are severe, they do not alone or
9 combination meet or medically equal a Listed impairment (Tr. 25).
10 The ALJ found Plaintiff less than completely credible, a finding
11 unchallenged on appeal (Tr. 26). At step four he found she can do
12 her past work as a waitress and cashier (Tr. 29). Because the ALJ
13 found Plaintiff can perform her past relevant work, she is not
14 disabled as defined by the Social Security Act (Tr. 29).

15 ISSUES

16 Plaintiff alleges error at step one. She asks the Court to
17 remand to further develop the record, specifically, to establish
18 the exact dates she worked in 2008. Second, she alleges the ALJ
19 should have found her impairments meet or equal Listings 1.04A
20 (spinal disorder) or 1.02A (weight-bearing joint dysfunction), or
21 both (ECF No. 18 at 4-8). The Commissioner answers that the ALJ
22 found in Plaintiff's favor at step one, meaning no issue is
23 presented on appeal. He further answers that at step three,
24 Plaintiff is estopped from arguing on appeal that her conditions

25
26 ¹At the end of the hearing the ALJ notes Plaintiff's
27 attorney will "secure some information from your former employer
28 and your current college" (Tr. 69). The record contains a few
college attendance notes (Tr. 225-227) and letter from the
employer containing no dates (Tr. 228).

1 meets or equal a Listing because she alleged at the hearing that
2 this is a step five case (ECF No. 21 at 2, 8-13).

3 **DISCUSSION**

4 **A. Step one**

5 On appeal Plaintiff alleges the case should be remanded to
6 clarify at step one the specific dates she worked in 2008 (ECF No.
7 18 at 4-5):

8 "Clearly, Ms. Baker earned over the SGA minimum for 2008.
9 However, the question remains whether she earned this money as
10 part of a trial work period, or whether it is merely evidence of
11 non-disability. It appears that the record is not clear on this
12 point and remand would be appropriate."
13 (ECF No. 18 at 5).

14 As the Commissioner correctly points out, the ALJ found in
15 Plaintiff's favor at step one, meaning she fails to raise an
16 appealable issue (ECF No. 21 at 9). See e.g. *Burch v. Barnhart*,
17 400 F.3d 676, 682 (9th Cir.2005)(plaintiff is not prejudiced when
18 the ALJ resolves a step in plaintiff's favor).

19 **B. Step Three**

20 Next, Plaintiff alleges she meets or equals two of the Listed
21 impairments (ECF No. 18 at 5-8).

22 The Commissioner responds that because Plaintiff waived this
23 argument at the hearing, she is estopped from asserting it on
24 appeal (ECF No. 21 at 9-11).

25 The Commissioner is correct.

26 The following exchange occurred at the hearing:

27 ALJ: So you're claiming a listing?

28 ATTY: Well, Your Honor, you know, it seems to be a more
intermittent finding so I don't know that we can get to

1 a listing.

ALJ: Okay.

2 ATTY: If, if it had been persistent then I would say yes,
3 but, but I don't think that's the case. Dr. Farah, in
4 fact concluded that she is not a surgical candidate.
That's at 1F . . .

ALJ: -- if it's not a listing and obviously not a grid rule-

ATTY: Right.

ALJ: -what is your ground?

ATTY: Well, I'm looking at step five, Your Honor.

7 (Tr. 35-36).

8 An argument not raised below may be deemed waived. See *Warre*

9 *v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1007 (9th Cir.

10 2006)(Plaintiff argued to the Commissioner her condition was

11 functionally equivalent to a listing, but failed to raise it in

12 the district court; she waived the issue). See also *Edlund v.*

13 *Massanari*, 253 F.3d 1152, 1158 n. 7(9th Cir.2001)(issues raised for

14 the first time on appeal are waived and will not be considered).

15 Even assuming that the issue is preserved, Plaintiff's

16 assertion is without merit. Plaintiff bears the burden of

17 establishing a condition or conditions meet or equal a listing. In

18 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005), the Court

19 stated

20 "The district court correctly explained that Burch
21 'bears the burden of proving that ... she has an
22 impairment that meets or equals the criteria of an
impairment listed in appendix 1 of the Commissioner's
regulations.'"

23 To meet or equal Listing 1.04A, a claimant must provide

24 evidence of nerve root compression, characterized by:

25 "neuro-anatomic distribution of pain, limitation of
26 motion of the spine, motor loss (atrophy with associated
27 muscle weakness or muscle weakness) accompanied by sensory
or reflex loss and, if there is involvement of the lower
back, positive straight-leg raising (sitting and standing)."

28 20 C.F.R. pt. 404, subpart P, app. 1, § 1.04A.

1 The ALJ considered the issue and found Plaintiff's condition
2 does not meet or equal a listed impairment. He specifically
3 considered listings 1.00, 11.00, and 12.00 (Tr. 25). The ALJ
4 observes the medical evidence alone does not meet the requirements
5 of the listings, including "specific signs, symptoms and
6 laboratory findings along with severe deficits in function" (Tr.
7 25).

8 The ALJ is correct. Plaintiff fails to present any evidence
9 of muscle atrophy or weakness, as the Commissioner notes. This is
10 one of several deficiencies (ECF No. 21 at 11). Plaintiff relies
11 on several positive straight leg raising tests performed by a
12 treating physician's assistant. These tests are noted on exams in
13 January and April of 2007 (Tr. 234-237). Other test results are
14 inconsistent. See e.g., Tr. 237.

15 Treating physician Edward Farrar, M.D., found no evidence of
16 nerve root compression during an examination on May 7, 2007. He
17 observed Plaintiff "has not yet made it into physical therapy,"
18 and is significantly overweight and deconditioned. The neurologic
19 exam in Plaintiff's lower extremities is "completely intact,"
20 distal pulses are intact, and there is no radicular pattern at
21 all. He opined Plaintiff's disc herniation is not significant
22 enough to warrant surgical decompression and recommended
23 injections and physical therapy (Tr. 240-241).

24 Plaintiff fails to establish that her condition meets or
25 equals Listing 1.04A.

26 Last, Plaintiff alleges she meets or equals Listing 1.02A,
27 requiring that a major peripheral weight-bearing joint, such as a
28 knee, renders a person unable to walk effectively. 20 C.F.R. pt.

1 404, subpart P, app. 1, § 1.02A.

2 Plaintiff fails to show that her walking limitation after
3 knee surgery in July 2009 (Tr. 287, 303, 309-310, 319-320)
4 constituted an "extreme" limitation for any significant time
5 period, as required by this listing. And, as the Commissioner
6 observes, Plaintiff's ability to mow the lawn and perform many
7 other activities is inconsistent with the severe functional
8 limitations described in the listing (ECF No. 21 at 13-14, Tr.
9 279).

10 A claimant for social security benefits carries the burden of
11 proving she is disabled. 42 U.S.C. § 423(d)(5)(A); *Valentine v.*
12 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir.2009).
13 Plaintiff fails to show her condition meets or is functionally
14 equivalent to Listing 1.02A. Her step three claims are plainly
15 without merit.

16 The trier of fact, and not the reviewing court, must resolve
17 conflicts in the evidence and, if the evidence can support either
18 outcome, the court may not substitute its judgment for that of the
19 ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.1992); *Burch*
20 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir.2005).

21 CONCLUSION

22 Having reviewed the record and the ALJ's conclusions, this
23 Court finds the ALJ's decision is free of legal error and
24 supported by substantial evidence..

25 IT IS ORDERED:

26 1. Defendant's Motion for Summary Judgment (**ECF No. 20**) is
27 **GRANTED.**

28 2. Plaintiff's Motion for Summary Judgment (**ECF No. 17**) is

1 **DENIED.**

2 The District Court Executive is directed to file this Order,
3 provide copies to counsel for Plaintiff and Defendant, enter
4 judgment in favor of Defendant, and **CLOSE** the file.

5 DATED this 5th day of March, 2011.

6
7 s/ James P. Hutton

8 JAMES P. HUTTON
9 UNITED STATES MAGISTRATE JUDGE